

## Department for Environment, Food and Rural Affairs

### Environmental Principles and Governance after EU Exit

#### Background to CIWEM

CIWEM is the leading independent Chartered professional body for water and environmental professionals, promoting excellence within the sector. The Institution provides independent commentary on a wide range of issues related to water and environmental management, environmental resilience and sustainable development.

CIWEM welcomes the opportunity to respond to DEFRA on its consultation on the Environmental Principles and Governance after EU Exit. This response has been compiled with the assistance of our members.

#### Response to consultation questions

**1. Which environmental principles do you consider as the most important to underpin future policy-making**

- *High importance / medium importance/ low importance / do not include / other / don't know-no opinion*
- *Please give any reasons for your answer*

**a) Sustainable development – High**

The Sustainable Development Commission defines sustainable development as 'development that meets the needs of the present, without compromising the ability of future generations to meet their own needs'. The UK is also a signatory to the UN Sustainable Development Goals, which, as they come from the UN, will still apply after Brexit. Sustainable development is more than a principle, it is an overarching goal, and should underpin all future policy-making across government.

**b) Precautionary principle – High**

The precautionary principle focuses on preventative action and has played, and continues to play, an important role in environmental protection and management and should underpin future policy-making in the UK. However, it is important to note that proportional implementation of the precautionary principle is appropriate, and that any application of it must be well-evidenced in order to not stifle innovation.

**c) Prevention principle - High**

- d) Polluter pays principle - *High***
- e) Rectification at source principle - *High***
- f) Integration principle - *High***
- g) Other not listed - *Access to justice in relation to environmental matters and non-regression***

CIWEM considers that it is not appropriate to prioritise any of the environmental principles over others. They are a suite of principles which have evolved over time and are complimentary to each other. Their importance is entirely contextual and will vary depending on the circumstances in which they are being applied, therefore there is no valid reason to prioritise the principles.

We strongly support the inclusion of the environmental principles in primary legislation. There must be no rollback on the principles we have now as minimum standards of environmental protection and therefore the inclusion of a non-regression principle in the Bill would also be desirable.

CIWEM considers that the principle of access to justice in relation to environmental matters to be very important and is pleased that it will be included in the forthcoming Environment Bill following the amendment to the EU Withdrawal Act. The only existing system in the domestic framework for members of the public to hold the government to account is Judicial Review, which is financially and practically unavailable to many. The new environmental governance mechanisms must allow the public and other bodies to initiate complaints free of charge, as is currently the case with the European Commission.

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**2. Do you agree with these proposals for a statutory policy statement on environmental principles (this applies to both Options 1 and 2)?**

- **Yes**
- **No**
- ***Other response***
- ***Don't know/no opinion***

CIWEM is pleased that the government is committed to transferring the environmental principles into UK law through the amendment to the EU Withdrawal Act, and that they will continue to shape our environmental policy post-Brexit. Clarity must be provided regarding their definition and appropriate application, so it is important that any policy statement regarding the environmental principles clearly and explicitly details how they should be applied. The policy statement must also be scrutinised and approved by Parliament.

We consider that the proposal to “balance environmental priorities alongside other national priorities, such as economic competitiveness, prosperity and job creation to provide sustainable development overall” in paragraph 40 is insufficiently ambitious. There is no economy, prosperity or jobs without the natural resources and capital provided by the environment, and their protection is provided by adherence to the environmental principles. Furthermore, sustainability-based government policy in a range of areas, including energy, health and transport can positively affect public spending and provide our industries and business with an international competitive advantage. Well-designed environmental regulations, and the clarity they provide, support and fuel economic growth, and there is no need to compromise long-term environmental protection for short-term, unsustainable economic growth. A healthy environment inevitably leads to a healthy society and economy (and conversely an unhealthy environment undermines these). Therefore, there is no need for the application of the environmental principles to be balanced with other priorities.

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**3. Should the Environmental Principles and Governance Bill list the environmental principles that the statement must cover (Option 1) or should the principles only be set out in the policy statement (Option 2)?**

- ***Option 1 – Environmental principles listed on the bill***
- ***Option 2 – Environmental principles only set out in the policy statement***
- ***Other response***
- ***Don't know/no opinion***

The environmental principles have underpinned and informed the development of our environmental legislation and are a fundamental reason behind improvements to our environment and natural habitats in recent decades.

In order to put in place the protections required to ‘leave the environment in a better state than we inherited it’, as the Government has stated is its aim, the principles must be enshrined into UK law. Their inclusion only via a policy statement is wholly inadequate and risks their being discarded the moment they become challenging or perceived as any kind of limit to delivery of other objectives, such as economic growth. As such, CIWEM is pleased that the Government has been committed to enshrining the principles in law through the amendment to the EU Withdrawal Act.

Listing the environmental principles in a policy statement only would be a significant weakening of their current status. The principles would no longer have to be observed in the decision-making process, they would effectively become advisory only.

The wording of the Bill should be such that ministers of the Crown and all public bodies with the power to exercise authority in environmental management should be required to act in accordance with the principles listed in the Bill as well as the policy statement, and not just ‘have regard to the policy statement’, which would be a significant weakening of their current legal status within EU law.

The consultation documents states that not including the principles in primary legislation would “offer greater flexibility for Ministers to adopt different principles in their policy statement as scientific knowledge and understanding of the nature of the environmental challenges facing this country and the wider world evolves”. However, it would also leave the protection of the environment to the whim of the current and any future government. Principles take time to evolve and do not change so rapidly that changes can’t be accommodate through further legislation, and the commitment to list them in legislation is entirely appropriate.

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**4. Do you think there will be any environmental governance mechanisms missing as a result of leaving the EU?**

- ***Yes, I agree with the assessment in the consultation document***
- ***I think the governance gap will be greater in some areas than that described in the consultation document***
- ***I think the governance gap will be less in some areas than that described in the consultation document***
- ***I do not think there will be any environmental governance mechanisms missing as a result of leaving the EU***
- ***Don't know/no opinion***
- ***Other response***

Currently, the European Commission provides the scrutiny function and the CJEU provides legal enforcement, and this system holds the government of member states to account on their implementation of environmental law. The Government has stated that once the UK leaves the EU, the UK will no longer be a party to EU Treaties, nor will it be under the jurisdiction of the CJEU, leading to a significant governance gap, as the consultation document states ‘existing domestic mechanisms do not themselves meet our ambitions’. CIWEM believes that the proposals in the Government’s consultation are not adequate to meet the enforcement and governance gaps in environmental protection left by leaving the European Union.

The new environmental body must have as a minimum the same powers as the existing arrangements to meet the ambition for a ‘world-leading body’ and to maintain standards of environmental protection. Unfortunately, the proposals in the consultation fall far short of replicating the existing governance framework.

As proposed, the body does not have the power to hold the Government properly to account through the legal system, it only has the ability to issue non-binding advisory notices with no legal repercussions were they to be ignored.

The gap in environmental governance mechanisms as is currently proposed would risk significant harm and damage to the environment as a result of removing the serious consequences associated with failure to comply with environmental laws.

CIWEM believes that the new environmental body needs to do more than scrutinise and advise. The role of such a body will be central to the regulation and enforcement of the implementation of environmental law and must have 'more teeth', in order to do its job effectively.

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**5. Do you agree with the proposed objectives for the establishment of the new environmental body?**

- *Yes / no / partially, but with amendments / don't know – no opinion*

**a) Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement – Yes**

This is essential. The new body must be adequately funded, and appropriately staffed by legal, technical, scientific and economic experts in order to function as a strong, objective and well-evidence body.

**b) Be independent of government and capable of holding it to account – Partially, but with amendments**

The new environmental body must be accountable to Parliament and not to government, in order to establish its genuine independence. It must have the power to hold the government properly to account through the legal system, and the power to levy fines.

**c) Be established on a durable, statutory basis – Yes**

The new environmental body must be accountable to Parliament, and its funding must be secure and proportionate to its sizeable remit. It must only be dissolvable through an Act of Parliament.

**d) Have a clear remit, avoiding overlap with other bodies – Yes**

The new environmental body must have a clear scrutiny, enforcement and regulatory remit. However, the regulatory scrutiny and enforcement actions undertaken by existing statutory bodies, for example the Environment Agency, must not be duplicated, but rather strengthened and supported.

The consultation states that the new environmental body might not consider climate change because such a focus would overlap with the remit of the Committee on Climate Change. CIWEM believes that the new environmental body should enforce compliance with climate change law and hold the Government to account on this issue. This is not a function that is currently the remit of the CCC, which only has an advisory role. This is an example of where the new body can add value to those bodies with common scope but distinct remits. CIWEM advocates that the remit of the new environmental body should be UK-wide, and it should be co-designed and co-created with all of the devolved administrations, enabling environmental protections and baseline standards to be set across the

UK. Environmental issues do not respect political and geographical boundaries, and neither should efforts to protect it. Discussions amongst the four nations on the new governance framework should begin in earnest, for it to be truly co-operative and co-designed, and so as not to impose a framework devised solely in Westminster.

**e) Have the powers, functions and resources required to deliver that remit – Yes**

The powers of the new environmental body must be extended to give it real power to properly hold the government and other public bodies to account through the legal system. Its funding must be proportionate and secure so as not to undermine its ability to function effectively within its remit.

**f) Operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities – No**

This objective weakens the previous ones by calling for environmental protection to be balanced against other government priorities. Whilst it is clearly very important that the new body is transparent, the caveat to the statement undermines the latest thinking on sustainability where win-win-win (economic, social and environmental) solutions should be sought rather than being detrimental to the environment. Well-designed environmental regulation and oversight are demanded by business for the clarity and long-term stability they provide, and support and fuel economic growth.

**g) Other objective not listed**

**6. Should the new body have functions to scrutinise and advise the government in relation to extant environmental law?**

*Yes / no / don't know – no opinion / other response*

The new body should certainly have the power to scrutinise, advise and also enforce the government and public authorities' implementation of extant environmental law, on the issues currently under the jurisdiction of the institutions of the European Union.

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**7. Should the new body be able to scrutinise, advise and report on the delivery of key environmental policies, such as the 25 Year Environment Plan?**

*Yes / no / don't know – no opinion*

**a) Annual assessment of national progress against the delivery of the ambition, goals and actions of the 25 Year Environment Plan – Yes**

The 25 Year Environment Plan is the key policy for the government for the long-term protection and enhancement of our environment, and in line with the ambition of establishing a "new, world-leading, independent statutory body to give the environment a voice, championing and upholding standards as we leave

the EU”, the new environmental body should scrutinise, advise and report on its delivery and the state of the environment annually. This would allow for proper and appropriate monitoring on its progress and success, and identify areas for prioritisation. Doing less than scrutinising policy would create a credibility gap in the establishment of such a body.

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**b) Provide advice when commissioned by government on policies set out in government strategies and other published documents and how they are being implemented – Yes**

The new environmental body should be able to assess performance and compliance against environmental policy objectives, milestones and targets.

**c) Respond to government consultations on potential future policy – Yes**

As an expert body, it should be a statutory consultee on potential future policy to ensure they are in line with the environmental principles.

**d) Other response**

**8. Should the new body have a remit and powers to respond to and investigate complaints from members of the public about the alleged failure of government to implement environmental law?**

*Yes / no / other response / don't know – no opinion*

Once the UK leaves the jurisdiction of the European Commission and the CJEU, the only existing system in the domestic framework for members of the public to hold the government to account is Judicial Review, which is financially and practically unavailable to many. The new environmental body must allow the public and other bodies to initiate complaints free of charge, as the European Commission currently allows. We suggest that it would then be for the body to consider whether these complaints are reasonable, and whether they warrant further investigation and escalation, and that its funding should be proportionate for this remit.

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**9. Do you think any other mechanisms should be included in the framework for the new body to enforce government delivery of environmental law beyond advisory notices?**

*Include / exclude / partially include but with amendments / don't know – no opinion*

**a) Binding notices – Include**

Without the ability to issue binding notices, the new body will not have the necessary 'teeth' to truly hold the government to account and to act as a deterrent against poor

environmental management. The new body should be an enforcement body not just an advisory body (as Committee on Climate Change is, for example), to replace the enforcement function the UK will no longer be subject to when we leave the EU.

**b) Intervention in legal proceedings – *Include***

This would enable the body to add value to proceedings initiated by other parties, through its role as an expert body.

**c) Agree environmental undertakings - *Include***

Environmental undertakings are a civil penalty which allow the offender to restore and remediate any environmental damage that they have caused, either directly or through compensation for damage by a donation to a project of similar environmental benefit. The new environmental body should have the power to agree these as part of their options for enforcement in a system of escalation.

**d) Other powers not listed above – *powers to levy fines***

The new body should hold a range of effective enforcement powers in a system of escalation to use at its discretion, starting with informal discussions with relevant ministers, governmental departments and public authorities as appropriate, leading to advisory notices, binding notices, legal action and ultimately a fine.

In order to replicate the existing system, the new environmental body must have the power to levy fines at those who have been found in breach of environmental law. The risk of reputational damage is not enough of a deterrent to encourage sound implementation of environmental law, as the current ongoing case against the UK being brought before the CJEU clearly demonstrates. Economic sanctions are required to give the new body adequate authority and ‘teeth’. Any funds collected should be ringfenced and used for environmental enhancement projects.

It is envisaged that fines would be levied rarely, and only as a last resort once a system of escalation had been exhausted and unsuccessful.

The new environmental body must have at least the same powers as the existing arrangements to meet the ambition for a ‘world-leading body’ and to ensure increased standards of environmental protection can be achieved. Unfortunately, the proposals in the consultation fall far short of the Government’s commitment to not weaken environmental protections after Brexit.

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**10. The new body will hold national government directly to account. Should any other authorities be directly or indirectly in the scope of the new body?**

***Yes / no / don’t know – no opinion***

**a) Non-Ministerial Departments (NMDs) and Non-Departmental Public Bodies (NDPBs) – please state which should be directly in scope – Yes**

The new body's remit must cover all public bodies with environmental management authority. This arrangement would do no more than recognise properly that many Government functions are now exercised by arm's length bodies, NMDs and NDPBs, especially in the area of regulatory compliance and enforcement, and all of these have independent roles, responsibilities and activities that could potentially cause environmental harm, so they too must be able to be held accountable for their actions.

**b) Local authorities – please state which should be directly in scope – Yes**

It is at local authority level that a vast amount of environmental law and policy is implemented 'on the ground', so the new body should be able to scrutinise and advise on this.

**c) Other public bodies – please state which should be directly in scope**

**d) Other response – Yes**

The jurisdictional scope of the new body should extend to all four countries of the United Kingdom, and not just England. Environmental issues do not respect political borders and boundaries, and so efforts to protect it shouldn't either. It is vital that the new environmental body has a high level of co-design and co-ownership across all devolved authorities, with multiple accountabilities and decisions being made at the appropriate scale. The joint framework should be considered the minimum baseline which does not hinder any government in setting and enforcing higher standards.

**11. Do you agree that the new body should include oversight of domestic environmental law, including that derived from the EU, but not of international environmental agreements to which the UK is party?**

*Include all / include some / exclude / don't know – no opinion / other response*

**a) EU environmental law retained under the EU (Withdrawal) Bill – Include all**

Currently, EU environmental law is subject to the system of scrutiny and enforcement provided by the European Commission and the Court of Justice of the European Union. After the UK leaves the EU, and is no longer under their jurisdiction, in order to avoid a governance gap and create so-called 'zombie legislation' which is no longer monitored or enforced, the new body must have the power to oversee, monitor, scrutinise and enforce the implementation and delivery of these retained laws.

**b) Domestic environmental law not based on EU legislation – Include all**

Any new environmental law, including the forthcoming Environment Act, will not be subject to vital scrutiny and enforcement of its implementation and delivery, so it is essential that the new body has the power to do this to ensure continued environmental protection, and achieve the aim of being a 'world-leading' body. It would be a clear oversight if domestic environmental law was excluded from the remit of the new body.

**c) International environmental law – *other response***

The new body should have the power to scrutinise and advise on implementation and delivery of international environmental agreements, and make recommendations to the relevant international committee charged with overseeing it.

**12. Do you agree with our assessment of the nature of the body's role in the areas outlined above?**

*Agree / disagree / partially agree – disagree / other / don't know – no opinion*

**a) Climate change – *disagree***

CIWEM considers that the decision to exclude climate change from the remit is problematic. Climate change benefits from strong legal protection through the Climate Change Act 2008, and the Committee on Climate Change has a wide remit and 'teeth' as an advisory body to Parliament.

However, the Committee on Climate Change is only an Advisory Committee. Whilst it has a strong framework to address climate change mitigation and adaptation, it does not have the power to hold the Government to account on its actions. Therefore, not including climate change in the remit of the new body risks leaving the enforcement of climate change law weaker than the rest of environmental law. The new body should not replicate the monitoring, scrutiny and advice functions of the CCC, but should have the power to hold government and public bodies to account through the legal system over their implementation of it.

The consultation document states that 'responsibility for most climate change policy and legislation falls under the responsibility of the Department for Business, Energy and Industrial Strategy'. However, Defra has responsibility for climate change adaptation, which is a fundamental aspect of climate change policy. Regardless of departmental responsibility, explicitly writing climate change out of the remit of the new body is wholly unacceptable. Environmental policy and legislation must be implemented using a cross-governmental approach to be effective. The new body must have jurisdiction over any relevant government department and not only Defra, Government departments and their remits are subject to change. Including climate change law under the remit of the new body is also sound future-proofing for any future climate legislation.

Climate change is a key factor in environmental harm. Many environmental policies result in benefits to climate and vice versa, so to not include it in a ground-breaking and world-leading new environmental body is remiss. Including climate change law in the remit of the new statutory body would ensure its status as a vital part of an environmental protection programme and ensure it has the same level of protection as the rest of environmental law.

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**b) Agriculture – *Other***

CIWEM agrees with the proposal that EU derived laws relating to agriculture should be within the scope of the new body, and that it should be given wider policy functions to assess delivery of the 25 Year Environment Plan, and therefore the agriculture measures within it. Whilst it is important that the new body has the power to scrutinise, advise and enforce agricultural law and policy as it plays such a critical role in environmental management, it should not replicate the functions of the Environment Agency (EA). The day to day regulatory function should be the remit of an adequately funded EA.

**c) Fisheries and the Marine Environment – *Other***

As with Agriculture, CIWEM believes that retained EU laws, new laws such as the anticipated Fisheries Bill, and environmental policies such as the 25 Year Environment Plan which includes measures relating to fisheries, should be within the remit of the new body.

**13. Should the body be able to advise on planning policy?**

*Yes / no / other response / don't know – no opinion*

Planning policy can have a significant effect on the environment therefore the new environmental body should be able to advise on planning policy. Planning policy, namely the NPPF, plays a vital role in environmental protection with its overarching goal of sustainable development. The new body should be expertly staffed in order to advise on planning policy, and should also be a statutory consultee on any new planning and infrastructure policy. It should also have the power to scrutinise decisions on Nationally Significant Infrastructure Projects to ensure they are in accordance with the environmental principles.

**14. Do you have any other comments or wish to provide further information relating to the issues addressed in this consultation document?**

After the UK leaves the EU, it is crucial that the scrutiny and justice functions currently provided by its institutions are replicated at a minimum by the new environmental body. The new body should be created in such a way that no government should

have the power to close it without scrutiny, and it should have secure funding and be expertly staffed in order to fulfil its sizeable remit. It should have power to hold the government, and public authorities with the power to exercise authority over environmental management, properly to account.

Leaving the EU should be used as an opportunity to go beyond maintaining and replicating the existing environmental protection that the UK currently benefits from, and should not lead to a weakening of those protections and regulations. The opportunity to design a truly world-leading framework of advice, scrutiny and enforcement which will protect our environment, biodiversity and natural habitats for future generations should be grasped.